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PRODUCT LIABILITY
FOULSTON SIEFKIN ISSUE ALERT

KANSAS SUPREME COURT HOLDS THAT SELLERS OF USED GOODS ARE SUBJECT TO STRICT LIABILITY UNDER THE KANSAS PRODUCT LIABILITY ACT

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ON AUGUST 12, 2011, the Kansas Supreme Court said sellers of used products are subject to strict liability. The decision in *Gaumer v. Rossville Truck & Tractor Co.* was the Supreme Court's first decision addressing the application of the Kansas Product Liability Act (KPLA) to sellers of used goods. The federal District Court of Kansas had previously concluded in *Sell v. Bertsch & Co.* that strict liability does not apply to sellers of used goods in Kansas. The Kansas Supreme Court rejected this interpretation and held that sellers can be strictly liable for defects in used goods.

Rossville Truck and Tractor Company sells, among other items, used farm equipment. Gaumer's father purchased a used hay baler from Rossville. Rossville displayed the baler with an "as-is" sign. The baler was missing a side safety shield that was originally part of the baler. The baler malfunctioned a week after purchase. When Gabriel Gaumer went to inspect the baler, he slipped and his hand entered the hole left open by the missing safety shield. As a result, Gaumer suffered serious injury. He sued Rossville, claiming the company should be strictly liable for selling an unreasonably dangerous and defective product.

With the *Gaumer* decision, Kansas is now in the slight minority of states that extend strict liability to sellers of used products. The *Gaumer* court determined that both Kansas common law and the KPLA provide a basis for strict liability actions against these sellers. In general, Kansas courts follow the *Restatement (Second) of Torts* § 402A in strict liability actions. Section 402A does not distinguish between sellers of used and new products. Similarly, Kansas legislators deleted language from the KPLA that would have exempted sellers of used products. Instead, the KPLA definition of product sellers includes those selling items for "resale."

In the opinion, the Supreme Court addressed the policy concern that sellers would either forgo selling products "as-is" or raise prices to reflect increased insurance costs if subject to strict liability. In both situations, Kansas buyers

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may be forced to go elsewhere for the products. However, the Supreme Court concluded the "seller's defense" found in the KPLA "should prevent the sky from falling on potential defendants."

The "seller's defense" in the KPLA applies to sellers of both new and used products. According to K.S.A. § 60-3306, a seller will not be held strictly liable if he or she can meet a five-part test:

(a) **The seller had no knowledge of the defect.**
First, the court determines whether the seller had knowledge of the defect at the time of the sale. A seller cannot avoid liability by deliberately remaining uninformed about a product's characteristics.

(b) **The seller could not have discovered the defect exercising reasonable care.**
The court then looks to see whether sellers should have found the defect during tests they *did* perform or tests they *should have* performed. Courts often find a duty to test by looking at "generally accepted" principles and practices in the industry. Independent industry safety standards may also establish a duty to test. However, compliance with these standards does not necessarily mean that a seller has met the standard of care. This is a factual question.

(c) **The seller was not a manufacturer.**
The definition of manufacturer in Kansas encompasses more than just the entity that physically manufactures the product. You are a manufacturer if you design, produce, make, fabricate, construct, or remanufacture the product. You are also a manufacturer if you hold yourself out as one (for example, repackaging a product in a box bearing your label).

(d) **The manufacturer is subject to service of process in Kansas.**
The plaintiff must be able to sue the manufacturer in Kansas.

(e) **A judgment against the manufacturer is reasonably certain to be satisfied.**
The court will look at the manufacturer's financial condition to determine whether the plaintiff will be able to recover from the manufacturer. If the manufacturer is solvent or has adequate insurance, then the court will find that a judgment can be reasonably satisfied.

Lessons Learned from *Gaumer*

Resellers of used goods should take away at least four things from the Kansas Supreme Court's decision.

1. You are clearly now subject to strict liability under the KPLA.
2. Even so, you will avoid liability if you can meet the five-part seller's defense test.
3. The elements of the seller's defense are fact intensive, which will lead to more litigation.
4. The opinion suggests that you cannot contract around this liability by selling used goods "as-is."

Action Required

This ruling can have significant impact on your practice of selling used goods and insurance costs. You may wish to contact your insurance broker and legal counsel to review current insurance

coverage, your business practices, and risks of litigation, as well as potential mitigation strategies. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your business needs.

For Further Information

Foulston Siefkin lawyers have represented manufacturers from all over the nation in product liability claims. As the largest Kansas law firm, Foulston Siefkin is able to draw on a multitude of resources to aid in product liability suits. Nearly 30 years of experience in product liability law gives our attorneys a distinct advantage and a background of helpful resources, knowledge, and experience. For additional information regarding the Kansas Product Liability Act, contact **David Rogers** at (316) 291-9708, or **drogers@foulston.com**. For more information on the firm, please visit our website at **www.foulston.com**.

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